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In the Supreme Court of the United States

OCTOBER TERM, 1985

KAREN SISTRUNK, SONYA SISTRUNK
and BETTY MAE RUTLAND

Petitioners

versus

CIRCLE BAR DRILLING COMPANY

Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Karen Sistrunk, Sonya Sistrunk and Betty Mae Rutland, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

(1) Whether the parents of seamen can recover nonpecuiniary damages in a cause of action under the General Maritime Law for wrongful death, where the seamen were killed in territorial waters and also were survived by spouses and/or children;

(2) Whether the principle of concurrent beneficiaries expressed in the statutory schedule of the Death on the High Seas Act, 46 U.S.C. §§761 et seq. [DOHSA] is appropriately borrowed for guidance in defining the class of beneficiaries under the General Maritime Law's non-statutory wrongful death remedy; and

(3) Whether nondependency should be a criterion used to disqualify beneficiaries who seek recovery of the nonpecuniary

damages allowable in wrongful death actions under the General Maritime Law.

PARTIES TO THE PROCEEDING

(1) KAREN SISTRUNK, as Administratrix of the Estate of Michael Glenn Sistrunk - Petitioner

(2) SONYA SISTRUNK, as Administratrix of the Estate of David Brian Sistrunk - Petitioner

(3) BILLIE JEAN SISTRUNK, making claim through Karen Sistrunk and Sonya Sistrunk as the surviving mother of Michael Glenn Sistrunk and David Brian Sistrunk.

(4) CREIGHTON SISTRUNK, making claim through Karen Sistrunk and Sonya Sistrunk as the surviving father of Michael Glenn Sistrunk and David Brian Sistrunk.

(5) BETTY MAE RUTLAND, as Administratrix of the Estate of Clifford Rutland - Petitioner

(6) EULA RUTLAND, making claim through Betty Mae Rutland as the surviving mother of Clifford Rutland.

(7) CIRCLE BAR DRILLING COMPANY - Respondent

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i.
PARTIES TO THE PROCEEDING	ii.
TABLE OF AUTHORITIES	v.
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	9
CONCLUSION	36
CERTIFICATE OF SERVICE	37
APPENDIX A	A-1
APPENDIX B	A-3
APPENDIX B-1	A-12

TABLE OF AUTHORITIES

Cases	Page
Complaint of Metcalf, 530 F.Supp. 446 (S.D. Tex. 1981)	23
Complaint of Sincere Navigation Corp., 1976 A.M.C. 2013 (E.D. La. 1976)	23
Green v. Ross, 338 F.Supp. 365 (S.D. Fla.), aff'd 481 F.2d 102 (5th Cir. 1972), cert. den'd, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973)	16
Guilbeau v. Calzada, 240 So.2d 104 (La. App. 1970)	16
Hamilton v. Canal Barge Co., Inc., 395 F.Supp. 978 (E.D. La. 1974)	15-16, 23, 31
THE HARRISBURG v. Rickards, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1866)	10
Hebert v. Otto Candies, Inc., 402 F.Supp. 503 (E.D. La. 1975)	23
In re: Farrell Lines, Inc., 378 F.Supp. 1354 (S.D. Ga. 1974)	16
Ivy v. Security Bar Lines, Inc., 606 F.2d 525 (5th Cir. 1979)	30
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)	9, 16, 20, 30

Cases — Page

Moragne v. States Marine Line, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) 9, 10-15, 35

Palmer v. Ribax, Inc., 407 F.Supp. 1974 (M.D. Fla. 1976) 23

The Sea Gull, 21 F.Cas. 909 (No. 12,578) (C.C. Md. 1865) 34-35

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) 9, 18-19, 25, 35

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985) 8, 18, 27, 28, 32

Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975) 20, 21, 23

Spiller v. Thomas M. Lowe, Jr. and Associates, Inc., 466 F.2d 903 (2d Cir. 1972) 15, 31

Stissi v. Interstate and Ocean Transport Co., 590 F.Supp. 1043 (E.D.N.Y. 1984) 15

Thompson v. Offshore Co., 440 F.Supp. 752 (S.D. Tex. 1977) 23, 24

Statutes **Page**

The Death on the High Seas Act,..... 11, 12 n.1
46 U.S.C. §761

The Federal Employers' Liability.... 12 n.1
Act, 45 U.S.C. §51

The Jones Act, 46 U.S.C. §688..... 11, 12 n.1

The Longshoremen's and Harbor..... 11, 12 n.1
Workers' Compensation Act,
33 U.S.C. §909

OPINIONS BELOW

Attached as Appendix A is the unreported, per curiam opinion of the Fifth Circuit Court of Appeal in Karen Sistrunk, et al. v. Circle Bar Drilling Co., rendered on October 7, 1985. This opinion denied petitioners' request for rehearing and suggestion for rehearing en banc with regard to the Fifth Circuit's initial decision in the matter, officially reported sub nom. Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985).

The unreported decision of the United States District Court for the Eastern District of Louisiana - from which the referenced Fifth Circuit appeal was taken - is contained both in the attached excerpt (pp. 20-23) from a transcript of a hearing before the District Court on November 10, 1982 [Appendix B] and in the attached Minute

Entry by the District Court on November 12, 1982 [Appendix B-1].

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals which gives rise to this petition was that Court's per curiam opinion rendered on October 7, 1985. A copy is attached hereto as Appendix A. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On August 8, 1980, the drilling vessel Circle Bar Rig No. 8 capsized in Moss Lake, within the territorial waters of the State of Louisiana. A number of crewmen aboard the vessel were drowned, including Michael Glenn Sistrunk, David Brian Sistrunk and Clifford Rutland. These three decedents all were survived by widows; and the decedents

Michael Sistrunk and Clifford Rutland also were survived by children.

In addition, Michael and David Sistrunk (brothers) were survived by their mother, Billie Jean Sistrunk, and their father, Creighton Sistrunk; and Clifford Rutland was survived by his mother, Eula Rutland.

The widows were legally appointed as representatives of the decedents' estates and, both individually and in this capacity, filed wrongful death actions for damages in the Eastern District of Louisiana against several defendants, including Circle Bar Drilling Company as the owner of the vessel and employer of its crew. The actions invoked the District Court's jurisdiction under both the Jones Act (46 U.S.C. §688) and the General Maritime Law. Both negligence and unseaworthiness were alleged.

Each of the above-named parents made claims for damages on the same bases in these respective proceedings, presenting their claims, as the law requires, through the widow-representative as named plaintiffs.

The parents sought the recovery of nonpecuniary damages for the loss of their sons' society. None of the parents was financially dependent upon decedents at the time of the casualty.

In the course of the proceedings, Circle Bar moved for summary judgment of dismissal as to the parents' claims. It argued that, since widows and children also survived and had brought claims for the decedents' wrongful deaths, the parents had no cause or right of action either under the Jones Act or under the General Maritime Law for the recovery of nonpecuniary damages.

The district judge (the Honorable A.J. McNamara) granted defendant's motion as

to the Jones Act claims, but denied the motion as to the claims arising under the General Maritime Law. Although no formal, written reasons were assigned, he stated from the bench at the hearing on defendant's motion on November 10, 1982 that

> the parents do have a cause of action, even if they have no pecuniary loss and even if the deceased is survived by widow and children... [T]hey do have a cause of action for death under general maritime law, and I am adopting the classes of beneficiaries as set forth in the Death on the High Seas Act.

Appendix B at p. 23. The judge also stated that it was appropriate , "to the extent possible," to achieve the goal of uniformity, and that the borrowing of the referenced Act's schedule of beneficiaries was "a step in that direction." Id. A Minute Entry in the record denying the defendant's motion (as to the General Maritime Law claims) was made on November 12, 1982. See Appendix B-1. Judge

McNamara declined at the time of his ruling to certify the question for interlocutory appeal.

Thereafter, all of the claims of the surviving widows and children were amicably settled. The parent-claimants and Circle Bar entered into an agreement whereby judgment would be entered in favor of claimants and against the defendant Circle Bar, dismissing the claims as to all other defendants, and specifying in each case the amount of damages to be paid by Circle Bar for wrongful death under the General Maritime Law, provided that on completion of the appeal process it was determined that the claimants were entitled to assert this cause of action.

Three separate judgments accordingly were entered on August 27, 1984. In the case brought by Karen Sistrunk as the widow-representative of the decedent Michael Sistrunk, judgment was entered against Circle

Bar and in favor of both Billie Jean and Creighton Sistrunk in the amount of $60,000.00 for each parent, together with legal interest at the rate of 10% from June 5, 1984 until paid in full. In the case of Sonya Sistrunk, the widow-representative of David Brian Sistrunk, judgment likewise was entered against the defendant and in favor of both Billie Jean and Creighton Sistrunk in the same amounts (i.e., $60,000.00 each, plus legal interest). In the case of Betty Mae Rutland, the widow-representative of Clifford Rutland, judgment was entered against the defendant and in favor of Eula Rutland in the amount of $25,000.00, with legal interest at 10% from June 5, 1984 until paid.

Circle Bar appealed from these judgments to the Fifth Circuit Court of Appeals. After briefs were filed and oral argument was heard, that Court rendered an opinion on September 9, 1985, reversing the

district court's judgments and finding that these nondependent parents were not entitled to recover damages under the General Maritime Law for the loss of their sons' society. The appellate decision is officially reported sub nom. Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985).

All claimants filed on September 23, 1985 both a Petition for Panel Rehearing and a Suggestion for Rehearing En Banc. In a per curiam opinion rendered on October 7, 1985, and attached hereto as Appendix A, the Fifth Circuit denied both the Petition and the Suggestion.

Claimants now seek this Court's review of the Fifth Circuit's reversal of the District Court's judgments in their favor.

ARGUMENT

I.

Pursuant to Rule 17 of the rules of this Court, review on certiorari is appropriate when, inter alia, the lower court has decided a federal question in a way which conflicts with this Court's applicable decisions. See Rule 17.1(c), Supreme Court Rules. It is respectfully submitted that the Fifth Circuit ruling below is just such a decision, since it's effect is contradictory to the combined authority and mandate of this Court in Moragne v. States Marine Line, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

Prior to the Moragne decision, of course, there was no recognized right of recovery for wrongful death under the aegis

of the General Maritime Law. See The Harrisburg v. Rickards, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1866). But when longshoreman Edward Moragne was killed while working aboard a vessel in Florida's territorial waters and his widow sought damages from the shipowner for unseaworthiness, the Court seized the opportunity to

> reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters.

Moragne v. States Marine Lines, Inc., supra, 398 U.S. at 377. Overruling The Harrisburg as "an unjustifiable anomaly," the majority held that an action would lie under the General Maritime Law for wrongful deaths occurring in territorial waters. See id. at 378 & 409.

The Court in Moragne felt that it was not so much establishing a new body of law as it was creating access to existing legal principles. See 398 U.S. at 405.

Questions concerning the remedy, therefore, for the most part were considered answerable by reference to already-known tenets of federal personal injury law. See id. at 406. Yet, determining a class of beneficiaries had no direct counterpart in nonfatal personal injury law.

The United States (amicus curiae in the case) submitted that three federal statutes - the Jones Act, 46 U.S.C. §688; The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §909 [LHWCA]; and The Death on the High Seas Act, 46 U.S.C. §761 [DOHSA] - were potential references on the subject, but that, of the three, DOHSA's

provisions were appropriate to borrow.[1] Several reasons for this were presented, as the Court took note:

First, DOHSA stands as the one Congressional enactment dealing "specifically and exclusively" with maritime wrongful death actions. Id. at 407. Its remedy is based upon a breach of the substantive duties imposed by the General Maritime Law; and it

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[1] Under the Jones Act, the class of beneficiaries (borrowed from the Federal Employers' Liability Act, 45 U.S.C. §51) allows recovery through decedent's personal representative by: spouses and children, or, if none, dependent "next of kin." 46 U.S.C. §688; 45 U.S.C. §51.

The LHWCA permits recovery by: surviving widows and children, or, if none, dependent grandchildren or siblings or parents. 33 U.S.C. §909 (a)-(c).

DOHSA extends recovery to a "decedent's wife, husband, parent, child, or dependent relative..." 46 U.S.C. §761.

extends that remedy not according to the status of the victim or a particular class of victims but rather on behalf of any "person" fatally injured by the breach. Id. at 407-8.

Conversely, the Jones Act, passed the same year as DOHSA, does not specifically address wrongful death; and, by its own terms, it applies only to a particular type of action, i.e., one brought by a seaman against his employer, based upon negligent standards not grounded in the admiralty but borrowed from the Federal Employers' Liability Act [FELA]. See id. at 407. Hence, the Jones Act concerns itself with both a class of victims and a set of legal responsibilities far different than those involved in the Moragne remedy.

As for the LHWCA, it too is a statute extending by design only to a particular, defined group of victims; and it seeks enforcement not of substantive duties shaped

in the maritime law but specific obligations arising out of the employer-employee relationship. In addition, the LHWCA has nothing whatever to do with damage recovery as a principle of compensation, and deals instead with the type of scheduled and standardized recovery which is common to workmen's compensation schemes. See id. at 407.

It was not necessary to define the eligible beneficiaries of the Moragne cause of action in that case because the widow-claimant would be considered a proper beneficiary under any wrongful death scheme consulted. Hence, the majority elected to defer, and allow this question to develop by "further sifting" through the lower court decisions. Id., 398 U.S. at 408.

At the same time, it is clear from the reading of the opinion that the most appropriate source of guidance and reference

in this regard would be DOHSA. The Court opined that:

> [t]he borrowing of its [DOHSA's] schedule of beneficiaries,... will not only effectuate the expressed congressional preferences in this area but will also promote uniformity by ensuring that the beneficiaries will be the same for identical torts, rather than varying with employment status of the decedent.

Id. at 408.

In numerous lower court decisions following Moragne, and consistent with this Court's directive, DOHSA has been looked to as the primary guidance and reference to determine the eligibility of a claimant-beneficiary under the General Maritime Law wrongful death remedy. See Spiller v. Thomas M. Lowe, Jr. and Associates, Inc., 466 F.2d 903 (2d Cir. 1972); Stissi v. Interstate and Ocean Transport Co., 590 F.Supp. 1043 (E.D.N.Y. 1984); Hamilton v. Canal Barge Co.,

Inc., 395 F.Supp. 978 (E.D. La. 1974); In re: Farrell Lines, Inc., 378 F.Supp. 1354 (S.D. Ga. 1974); Green v. Ross, 338 F.Supp. 365 (S.D. Fla.), aff'd 481 F.2d 102 (5th Cir. 1972), cert. den'd, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); Guilbeau v. Calzada, 240 So.2d 104 (La. App. 1970). But if any doubt possibly could remain as to whether the lower courts should continue to look to DOHSA as primary reference in "sifting" through to a definition of the beneficiary schedule, surely that doubt was resolved by this Court's decision in Higginbotham, supra. There it was reiterated that:

> DOHSA should be the courts' primary guide as they refine the non-statutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right.

436 U.S. at 624 [emphasis added].

In seeking to be recognized as beneficiaries in this case, the parent-claimants therefore have invited reference to DOHSA as a primary guideline. They have argued that the principle of a concurrent, nonpreemptive recovery by parents on the one hand and widows and/or children on the other, is appropriately borrowed from this statute. Surely it is no less true today than it was in the year Moragne was decided that DOHSA stands as the one, single Congressional enactment dealing specifically and exclusively with maritime wrongful death actions, the one statutory source for a remedy based upon the breach of duties imposed by the general maritime law, and the one act of Congress extending the remedy not according to the status of a victim or a particular class of victims, but rather on behalf of the survivors of any "person" fatally injured in a maritime action on the high seas.

The Fifth Circuit's refusal to adopt this principle of concurrent recovery by way of analogy to DOHSA appears grounded on the fact that DOHSA itself would not permit recovery for the nonpecuniary loss suffered by these parents. In the words of the appellate panel, the issue of who recovers and the issue of what is recovered cannot be so "split." See Sistrunk v. Circle Bar Drilling Co., supra, at 459-60.

In point of fact, the issues have been - and must be - split if reference to DOHSA as a guideline for beneficiary eligibility is to continue as meaningful following this Court's decision in Gaudet, supra.

There, only a few years after Moragne, the Court had occasion to provide additional impetus to the "sifting" process of the lower courts by further definition of the substantive elements of the maritime death remedy. In fulfillment of the "humanitarian policy"

underlying Moragne, it held that both pecuniary and nonpecuniary loss (i.e., the loss of society, in addition to the loss of support, etc.) would be compensable in wrongful death actions under the General Maritime Law. See Sea-Land Services, Inc. v. Gaudet, supra, 414 U.S. at 584 & 588.

A resulting question was whether or not this allowance of nonpecuniary damages would create a certain tension in that lower courts might continue to refer to DOHSA to determine the beneficiary eligibility of certain claimants whose (nonpecuniary) damages would not be allowable under that statute.[2]

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[2] Dissenting from the majority opinion in Gaudet, Justice Powell articulated his concern over this tension:

> Presumably, in resolving such questions the lower courts are to continue to rely on the admiralty wrongful death statute. Now they are placed in the interesting position of analogizing to statutes under which the very claim before them would be blocked. 414 U.S. at 602.

It is obvious that the majority in Gaudet was not dissuaded by this concern over "splitting" the issue. Equally obvious is the fact that the inclusion of nonpecuniary elements of recovery in the maritime death action did not prevent this Court more recently in Higginbotham from again encouraging the lower courts to consider DOHSA the "primary guide" for further definition of the remedy. See Mobil Oil Corp. v. Higginbotham, supra, 436 U.S. at 624.

The appellate court's approach is all the more surprising in light of this same Circuit's earlier decision in Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975). There a nondependent adult child of a motorboat passenger killed in territorial waters, which decedent also was survived by a spouse and minor child, was allowed to seek recovery for the loss of her parent's society. The

Fifth Circuit's decision was based on the suggestion in Moragne to look to sources like DOHSA for guidance on the eligibility of a claimant, despite the fact that the loss of society damages in question were not recoverable (under either the Jones Act or DOHSA). See id. at 729 n.11.

The combined result of Moragne, Gaudet and Higginbotham is that the lower courts in a wrongful death action under the General Maritime Law (1) should look primarily to DOHSA as a reference and guide to delineate the class of beneficiaries and (2) must do so without regard to the fact that the Gaudet-approved recovery of nonpecuniary loss would not be recognized under the statute (DOHSA) itself. Yet the Fifth Circuit in this case instead has declined to borrow the principle of concurrent recovery by a parent under DOHSA on the erroneous ground that the

damages recoverable by the parents under the General Maritime Law are not recoverable under DOHSA as well. The illogic of this approach is that DOHSA automatically ceases to be a guide on the subject of beneficiary status in any and all cases where Gaudet- approved damages are sought by the claimant.

II.

The net effect of the Fifth Circuit decision in this case is to disqualify a claimant in a Moragne/Gaudet cause of action because of his or her financial nondependency upon the decedent. The use of dependency as a criterion of eligibility in such cases, however, is not only illogical but inconsistent with both other lower courts' express decisions and this Court's implicit rulings on the subject. See Rule 17.1(a) & (c), Supreme Court Rules.

First, to the extent it did look to DOHSA and disqualified these parents for the lack of financial dependency, the appellate court failed to note that DOHSA itself, though admittedly limiting recovery to pecuniary damages, expressly requires dependency for claimant status only for "relatives" other than parents. See fn.1, supra; see also Hamilton v. Canal Barge Company. Inc., supra. Indeed, both the Fifth Circuit itself and district courts within it repeatedly have held that dependency is not a prerequisite to beneficiary status under that statute (save as to "relatives" other than spouses, children, or parents). See Skidmore v. Grueninger, 506 F.2d 716 (5th Cir. 1975); Complaint of Metcalf, 530 F.Supp. 446, 460 (S.D. Tex. 1981); Thompson v. Offshore Co., 440 F.Supp. 752, 765 (S.D. Texas 1977); Complaint of Sincere Navigation Corp., 1976 A.M.C. 2013, 2016-17 (E.D. La. 1976); Palmer

v. Ribax, Inc., 407 F.Supp. 974, 979 (M.D. Fla. 1976); Hebert v. Otto Candies, Inc., 402 F.Supp. 503, 507 (E.D. La. 1975); Hamilton v. Canal Barge, Inc., supra.

It is especially untoward to consider financial dependency a requirement of beneficiary status following this Court's decision in Gaudet. Almost any other criterion (residency, for example, or the number of years cohabitation between claimant and decedent) would be more apt. As was noted by the district court in Thompson, supra:

> [B]ecause a loss of society is not a financial loss, it would be inappropriate to conclusively presume that only those family members financially dependent on the decedent have suffered such loss.

Thompson v. Offshore Co., supra, at 765.

Considering the General Maritime Law death remedy itself, it is significant that this Court's first post-Moragne

delineation (in Gaudet) was liberalizing and expansive. The defendant vessel owner there had asked that the widow's recovery be confined to only dependency-related, non-pecuniary damages, and this the majority refused to do.

Gaudet, like Moragne before it, happened to deal with the case of a dependent claimant/widow. Otherwise, there is nothing in the reasoning, logic, analysis, or conclusion of the holding to suggest that it modified the Moragne remedy by limiting recovery thereunder to dependent survivors only; and no inference of that limitation logically derives from an opinion generally dedicated to the "humanitarian" guidance of its predecessor.

The practical effect of Gaudet, finally, was to permit recovery for a loss of "society" defined to include the compensation of family members for having been

deprived of a decedent's "love, affection, care, attention, companionship, comfort and protection." 414 U.S. at 585. A theory of recovery founded on loss of this nature hardly presumes or requires the family member to have been financially dependent.

With the recovery of nondependent claimants in a Moragne/Gaudet cause beyond serious dispute, the claimant-parents' recovery herein cannot be burdened or impaired because of their nondependency or claims of solely nonpecuniary loss under Gaudet. The loss of society is compensable as an element of damages in a cause such as this, regardless of whether the claimant seeking to recover was dependent on decedent. Unless the fundamental holdings of Moragne, Gaudet, Skidmore and the above-cited district court jurisprudence are to be ignored or rejected, it but confuses the question at hand to impose financial dependency as a condition of

recovery. The issue is whether these claimants, qua parents, may recover Gaudet-approved damages for nonpecuniary loss, in a maritime wrongful death action based upon unseaworthiness, notwithstanding the survival of, and recovery of separate damages by, decedents' surviving widows and children. By basing its resolution of that issue on considerations of these claimants' financial dependency vel non, the Fifth Circuit has departed from the accepted and approved definition of the General Maritime Law remedy for wrongful death.

III.

The appellate court properly invoked the "twin aims" of "uniformity" and "special solicitude" for victims in seeking to view the present case within the framework of the Moragne/Gaudet remedy. See Sistrunk v. Circle Bar Drilling Co., supra, at 458.

Yet the result of excluding concurrent recovery by parents as well as widows and children in a territorial waters death case is actually to oppose both aims. To this extent, the court below again is in conflict with this Court's trio of seminal decisions in this area - Moragne, Gaudet and Higginbotham - all of which espouse the goals of uniformity and solicitude in giving shape to the nonstatutory remedy. See Rule 17.1(c), Supreme Court Rules.

The appellate court's conclusion that the denial of recovery herein would lend more uniformity to admiralty jurisdiction than would the allowance of recovery, seems based first and foremost on the fact that "[t]he parents in this case could not have recovered for loss of society under other maritime remedies." Sistrunk v. Circle Bar Drilling Co., supra, at 459. The Court also noted that the allowance of recovery would

be "anomalous" in two respects: first, parent-claimants might recover under Moragne for unseaworthiness but not under the Jones Act for negligence; and, secondly, the parent-claimants would recover in territorial waters under Moragne but not on the high seas under DOHSA.

It is respectfully submitted that the lower court again has given improper and erroneous regard to its concern with the fact that DOHSA in and of itself would not afford the recovery of nonpecuniary damages by these particular parent-claimants. As already noted, that statutory reality, fixed as it is by Congress, cannot and should not be determinative in the shaping of a wholly-jurisprudential wrongful death remedy pursuant to the Supreme Court's mandate in Moragne. In the same way, the anomalies of which the Court took note are the creatures of a present juxtaposition of the nonstatutory

death remedy in territorial waters with the statutory death remedy beyond. They are hardly dispositive of the present issue.

This Court in Higginbotham squarely confronted the matter of some non-uniformity in the present scheme, concluding that its desire for uniformity could not "override" the exclusive application of DOHSA on the high seas. See, Mobil Oil Corp. v. Higginbotham, supra, 436 U.S. at 624. But in the same breath, the Court opined that "disparities" would be less likely to develop if the lower courts continued to delineate the Moragne remedy by reference to DOSHA. See id.

Hence, to eliminate "all disparities" in the present state of maritime wrongful death law would be virtually impossible. See Ivy v. Security Barge Lines, Inc., 606 F.2d 525, 534 (5th Cir. 1979) (J. Brown dissenting). But in failing to heed this Court's directives, the Fifth Circuit now has created

an unnecessary disparity in territorial waters between dependent and nondependent claimants.

The matter is far more fruitfully and appropriately considered in a broader context: Long before Moragne, DOHSA and the Jones act coexisted as separate, supplemental remedies on the high seas. One statute's class of beneficiaries complemented the other's in the recovery of damages for combined negligence and unseaworthiness. See Spiller v. Thomas M. Lowe, Jr. and Associates, Inc., supra, at 908 n.7; Hamilton v. Canal Barge Lines, Inc., supra, at 984. By defining Moragne beneficiaries in territorial water death cases according to the principle of nonpreemptive recovery by beneficiaries under DOHSA, the same coexistence of remedies and beneficiaries schedules would coexist within three miles as now exists beyond.

It is further submitted that the Fifth Circuit has misconstrued and misapplied the objective of a special solicitude for seamen in this matter. As the Court itself noted, that solicitude was designed by Moragne to extend to all survivors of seamen killed in territorial waters, and not just dependent survivors. See Sistrunk v. Circle Bar Drilling Co., supra, at 460 n.4. It therefore is both surprising and contradictory for the Court to have concluded that "the special solicitude aim of admiralty has no relevance in this case," because the parents were not dependent on their sons. Id. In point of fact, the longstanding tradition of solicitude for seamen in this country has never at any time been so limited in scope or so narrowly defined as to afford concern only for survivors who happen to be financially dependent on the victim. To suggest that this is, or has been, the case would be to set up an

entirely unwarranted and capricious distinction between the grief of a seaman's dependent family member and the grief of a seamen's nondependent family member. If the solicitude for the deceased seaman is to be genuine, it surely matters not whether his survivors fortuitously were able to support themselves without his financial assistance while he lived.

Finally, the court has misconstrued the principle of solicitude by suggesting that Congress sought to modify it with the enactment of statutes precluding recovery by certain beneficiaries, i.e., DOHSA and the Jones Act. If this Court were bound and limited by the divining of legislative intent when statutory law was enacted in 1920, the rationale for Moragne and the mandated "sifting" through by lower courts to delineate the remedy afforded by that case would hardly exist.

Although overruled in result, one notable jurist's opinion was cited in THE HARRISBURG. Salmon Chase, Chief Justice of the Supreme Court but sitting on circuit at the time, had twenty years earlier allowed wrongful death damages in a case arising out of a collision in the territorial waters of Chesapeake Bay. He found authority in the General Maritime Law, reasoning that it stood apart from and was not governed by the doctrines of the common law, and that

> it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy...

THE SEA GULL, 21 F.Cas. 909, 910 (No. 12,578) (C.C. MD. 1865) [cited at 119 U.S. 206]. This Court in Moragne harkened back to the same, longstanding principle of

> a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages [citations omitted].

398 U.S. at 390. And this court in Gaudet likewise reiterated the age-old view of Justice Chase that, where possible, it was more suitable in admiralty to extend than to withhold a remedy. See 414 U.S. at 583.

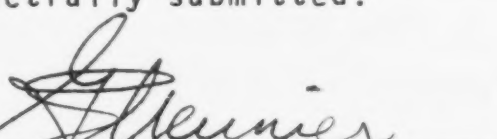
It should be no less fitting in this day of semi-submersible drilling vessels than it was in the era of wooden hulls that the immediate victims of maritime tragedy, such as the parents of lost crewmen (dependent or otherwise), be afforded a just remedy and compensation under the General Maritime Law.

CONCLUSION

This petition calls for authoritative clarification and guidance by this Court, in the continuing tradition of Moragne, Gaudet and Higginbotham. It also requires the resolution of conflicts between the Fifth Circuit decision below and the rationale and bases of numerous lower court decisions as well as the decisions of this Court.

For all the foregoing reasons, it is respectfully submitted that certiorari should be granted.

Respectfully submitted:

BY: 

GERALD E. MEUNIER
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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned counsel for petitioners has caused three copies of the foregoing Petition for Writ of Certiorari to be served on Mrs. Margot Mazeau and Michael H. Bagot, Jr., Esq., Thirtieth Floor, Texaco Center, 400 Poydras Street, New Orleans, Louisiana, 70130-3195 and on C. Theodore Alpaugh, III, Esq., 1424 Whitney Bank Building, New Orleans, Louisiana, 70130, by placing same in the Federal Express Mail, postage prepaid, this 3rd day of January, 1986.

GERALD E. MEUNIER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3671

Karen Sistrunk, Individually and As Administratrix of the Estate of Michael Glenn Sistrunk, Plaintiff-Appellee

vs.

Circle Bar Drilling Company, Defendant-Appellant

* *

Sonya Sistrunk, Individually and As Administratrix of the Estate of David Brian Sistrunk, Plaintiff-Appellee

vs.

Circle Bar Drilling Company, Defendant-Appellant

* *

Betty Mae Rutland, Individually and As Independent Executrix and Representative of the Estate of Clifford Rutland, Plaintiff-Appellee

vs.

Circle Bar Drilling Company, Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 9, 5 Cir., 1985, 770 F.2d 455)

(October 7, 1985)

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/Thomas M. Reavley
United States Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS

* * * * * * * * * * * * *	*	CIVIL ACTION
KAREN SISTRUNK, ET AL	*	
	*	NO. 81-559
	*	Consolidated with
	*	81-474; 81-504;
VERSUS	*	81-512; 81-514;
	*	81-2733
	*	
CIRCLE BAR DRILLING COMPANY	*	SECTION "D"
* * * * * * * * * * * * *	*	

Transcript of PROCEEDINGS had in the above entitled matter held in the Courtroom, 500 Camp Street, New Orleans, Louisiana, on Wednesday, November 10, 1982, before the Honorable A. J. McNamara, District Judge presiding.

APPEARANCES:

KIERR, GAINSBURGH, BENJAMIN, FALLON & LEWIS

BY: GERALD E. MEUNIER, ESQ.
1718 First National Bank of
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New Orleans, Louisiana 70112

Representing Plaintiffs

PHELPS, DUNBAR, MARKS, CLAVERIE
& SIMS
BY: MS. MARGOT MAZEAU, ESQ.
1300 Hibernia Bank Building
New Orleans, LA. 70112

Representing Defendants

REPORTED BY:

THOMAS H. CONRAD, CSR
Official Court Reporter

BY THE COURT:

I have given the matter alot of thought. I have studied your memos and I will issue a written opinion at a later date. But, I am going to deny the motion

for summary judgment for the following reasons: that we started out with THE HARRISBURG in 1886 that said that there was no cause of action under General Maritime Law for death. We then have the Death on the High Seas Act enacted by Congress, and finally, in Moragne, 1970, specifically overruled THE HARRISBURG and found that there was a cause of action for death in the General Maritime Law. Of course, as the Moragne decision indicated, it was going to leave to the shifting of lower Courts, the issues of who were the classes of beneficiaries and what were the elements of damages. Finally, Gaudet was decided, we got some insight into the elements of damages, but nothing into the classes of beneficiaries. The entire purpose, as I read Moragne, was to try to approach

uniformity in the General Maritime Law and to specifically get away from adopting state statutes which completely destroyed uniformity. In spite of the message of Moragne for uniformity in the maritime law, when Higginbotham was decided, we did, to some extent, destroy uniformity, because we allowed for a different measure of recovery on the Death on the High Seas, as opposed to a death in territorial waters, and that Higginbotham limited recovery to pecuniary loss.

The question, it seems to me, now, is: Should this Court hold that because we have had a partial destruction of uniformity by the Higginbotham decision,

that we should revert to looking at, perhaps, state death statutes and throw up our hands and say, the goal of uniformity in Moragne is forever lost and we must leave that goal. And I don't think so. I think that it makes more sense to adopt the classes of beneficiaries in the Death on the High Seas Act, though I can see a potential problem with it. The problem I see, and I don't read the Death on the High Seas Act as you do now, I read it with the modifier only applying to relatives, and not to parents. I read it in the same way that Judge Rubin read it in the Hamilton decision. The problem I see in it, as a practical matter, is that we are adopting a Death on the High Seas Act class of beneficiaries, where, with relatives, you are going to have to show that you are

dependent, in order to be a beneficiary. But, once you becme a beneficiary, under the Gaudet decision, your damages are not going to be limited to pecuniary damages. So, we are going to have a situation where if you are not a dependent relative, you don't have a cause of action. But, once you are a dependent relative, your cause of action is not going to be limited to damages that give rise to the definition of dependency. It's going to also include the loss of society and those other things mentioned in Gaudet. I see that as a problem.

But, on balance, I think that -- and who knows what the people next door will do with this one, if they finally get

it -- we will have gone from Harrisburg to Moragne, to Gaudet, to Higginbotham, and maybe to Sistrunk, which is this case.

But, I am going to rule that the parents do have a cause of action, even if they have no pecuniary loss and even if the deceased is survived by widow and children, that they do have a cause of action for death under the General Maritime Law, and I am adopting the classes of beneficiaries as set forth in the Death on the High Seas Act.

I think that though we have lost some uniformity in Higginbotham, it's not necessary to retreat from that goal completely and I am going, to the extent possible, try to achieve that goal, and I think that adopting the Death on the High Seas Act class of beneficiaries is a step in that direction.

23(a)

So, I am going to have to deny your motion for summary judgment.

oOo

APPENDIX B-1

81-474 "D"(C)(5)

Plaintiffs	Defendants
Circle Bar Drilling Co.	M/V NORMANDE, its engines, tackle, apparel, furniture, etc., in rem
	TWENTY GRAND MARINE SERVICE, INC.
	ABC INSURANCE COMPANY
	TIDEWATER MARINE TOWING, INC.
	M/V LISA CAROL, its engines, tackle, apparel, furniture, etc., in rem
Cons/w 81-504; 81-512, 81-514; 81-559; 81-2733	ANSLUM BOAT RENTAL, INC.

CAUSE

USC UNKNOWN (CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

CAPSIZING OF PLAINTIFF'S DRILLING BARGE CAUSED BY NEGLIGENCE OF DEFENDANTS' EMPLOYEES

ATTORNEYS

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
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FOR: ANSLUM BOAT RENTAL, INC.

LISKOW & LEWIS
Charles M. Steen
Robert W. Booksh
50th Floor
One Shell Square
NOLA 70139
581-7979

WEDNESDAY, NOVEMBER 10, 1982

a) Motion of Defts., Circle Bar Drilling Co., Anslum Boat Rentals, Inc., Sea-Con Services, Inc., Tidewater Towing Co., Inc., Twenty Grand Marine Service, Inc. and Universal Towing Co., Inc., for Summary Judgment: (And Consolidated Cases) 10:00 AM

O R D E R E D

_____ No Opposition
__X__ Argument
_____ Submitted on Briefs

_____ GRANTED
__X__ DENIED
_____ DENIED AS MOOT
_____ DISMISSED AS MOOT

_____CONTINUED to_____

_____SUBMITTED as of_____

Additional briefs to be filed by_____

Reply briefs to be filed by_____

__X__Reasons given orally by the Court.

__X__Written reasons to be issued.

PHELPS - Mazeau
Bagot, Jr.

DATE OF ENTRY NOV 12, 1982

Supreme Court, U.S.
FILED
JAN 23 1986
JOSEPH F. SPANIOL
CLERK

NO. 85-1144

In the Supreme Court of the United States

OCTOBER TERM, 1985

KAREN SISTRUNK, SONYA SISTRUNK
and BETTY MAE RUTLAND

Petitioners

versus

CIRCLE BAR DRILLING COMPANY

Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

GERALD E. MEUNIER
1718 First NBC Building
New Orleans, Louisiana 70112
504/522-2304
ATTORNEY OF RECORD FOR
PETITIONERS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KAREN SISTRUNK, SONYA SISTRUNK
and BETTY MAE RUTLAND

Petitioners

versus

CIRCLE BAR DRILLING COMPANY

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Karen Sistrunk, Sonya Sistrunk and Betty Mae Rutland, petitioners herein, respectfully submit this Appendix to their earlier-filed Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

APPENDIX A-1

Karen SISTRUNK, Individually and As
Administratrix of the Estate of
Michael Glenn Sistrunk, Plaintiff-Appellee,

v.

CIRCLE BAR DRILLING COMPANY,
Defendant-Appellant.

Sonya SISTRUNK, Individually and As
Administratrix of the Estate of
David Brian Sistrunk, Plaintiff-Appellee,

v.

CIRCLE BAR DRILLING COMPANY,
Defendant-Appellant.

Betty Mae RUTLAND, Individually and
As Independent Executrix and
Representative of the Estate of
Clifford Rutland, Plaintiff-Appellee,

v.

CIRCLE BAR DRILLING COMPANY,
Defendant-Appellant.

No. 84-3671.

United States Court of Appeals,
Fifth Circuit.

Sept. 9, 1985.

Widows of seamen who were killed in territorial waters filed wrongful death actions, and parents joined in the actions, seeking nonpecuniary damages for loss of society. The United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., entered judgment in favor of parents, and defendant drilling company appealed. The Court of Appeals, Reavley, Circuit Judge, held that parents of seamen could not recover nonpecuniary damages for loss of society in wrongful death action brought under genderal maritime law, where the parents were not dependent on the seamen and where the seamen were killed in territorial waters and were survived by spouses and/or children.

Reversed.

Parents of seamen could not recover nonpecuniary damages for loss of society in wrongful death action brought under general maritime law, where the parents were not dependent on the seamen and where the seamen were killed in territorial waters and were survived by spouses and/or children. Death on the High Seas Act, §§1-7, 46 U.S.C.A. §§761-767; §8, 41 Stat. 537; Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, § 1, 45 U.S.C.A. §51; LSA-C.C. art. 2315.

Phelps, Dunbar, Marks, Claverie & Sims, Margot Mazeau, Michael H. Bagot, Jr., C. Theodore Alpaugh, III, New Orleans, La., for defendant-appellant.

Kierr, Gainsburgh, Benjamin, Fallon & Lewis, Gerald E. Meunier, New Orleans, La., for Sistrunk, et al.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, REAVLEY and GARWOOD, Circuit Judges.

REAVLEY, Circuit Judge:

The sole question presented in this appeal is whether parents of seamen can recover nonpecuniary damages in a cause of action under general maritime law for wrongful death where the seamen were killed in territorial waters and were survived by spouses and/or children. The district court held that the parents could recover. We reverse.

I.

On August 8, 1980, Circle Bar Rig No. 8, a drilling vessel owned by Circle Bar Drilling Co., capsized in the territorial wates of the State of Louisiana. Among the crewmembers who drowned were the Sistrunk brothers, Michael Glenn and David Brian, and

Clifford Rutland. Michael Sistrunk was survived by a widow, children, and his parents. David Sistrunk was survived by a widow and his parents. Clifford Rutland was survived by his widow, children, and mother.

The widows were appointed as the representatives of their deceased husbands' estates and filed wrongful death actions under the Jones Act, 46 U.S.C. §688 (1982), for negligence and under general maritime law for unseaworthiness. The parents joined in these actions seeking nonpecuniary damages for the loss of their sons' society. None of the parents were financially dependent on their sons at the time of the casualty.

In denying Circle Bar's motion for summary judgment, the district court held that the parents had a cause of action for loss of society under Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). Thereafter, all of the

claims of the widows and children were settled. Judgment in favor of the parents was entered after Circle Bar and the parents stipulated that the vessel was unseaworthy and the quantum of damages.[1]

II.

The sole cause of action under which the parents may recover is the general maritime law cause of action for wrongful death announced in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). Other possible causes of action do not provide a remedy for the parents.

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1 The Sistrunks received a total of $240,000 for the loss of society of their sons. Rutland received $25,000 for the loss of society of her son.

The Death on the High Seas Act (DOHSA), 46 U.S.C. §§761-768 (1982), does not apply to deaths occurring, as here, in territorial waters and limits recovery to pecuniary damages, 46 U.S.C. §762 (1982). The Jones Act, 46 U.S.C. §688 (1982), is not available, because parents can recover only when the seaman is not survived by a spouse or children, 45 U.S.C. §51 (1982). Finally, the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (West Supp. 1985), is supplanted in

457

maritime wrongful deaths by the general maritime cause of action for wrongful death created in Moragne. Matter of S/S HELENA, 529 F.2d 744, 753 (5th Cir. 1976).

Because the parents' remedy is exclusively under Moragne, we begin with a discussion of that case. In The HARRISBURG, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed.358 (1866), the Supreme Court held that general maritime

law did not provide a cause of action for wrongful death. As a result, there was no remedy for death on the high seas caused by the breach of a maritime duty. If the death occurred in territorial waters, federal law allowed the survivors to recover under the adjacent state's wrongful death statute. Moragne, 398 U.S. at 393, 90 S.Ct. at 1784, 26 L.Ed.2d at 352. In an effort to provide seamen with a greater range of remedies, Congress in 1920 enacted DOHSA, ch. 111, §§1-8, 41 Stat. 537 (codified as amended at 46 U.S.C. § 761-768 (1982). DOHSA, 46 U.S.C. §761 (1982), and the Jones Act, ch. 250, §33, 41 Stat. 1007 (codified as amended at 46 U.S.C. §688 (1982). DOHSA, 46 U.S.C. §761 (1982), creates a maritime cause of action for wrongful death on the high seas, and the Jones Act, 46 U.S.C. §688 (1982), provides a remedy at law against seamen's employers for seamen injured or killed through the

negligence of the employer. In 1964, the Supreme Court held that survivors of seamen killed in territorial waters could sue the deceased seamen's employers only under the Jones Act, to the exclusion of state wrongful death statutes and claims based on unseaworthiness. Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964).

By 1970, under this tripartite statutory scheme, the proper remedy was dependent on the conjuncture of numerous factors: whether the injury occurred on the high seas or in territorial waters; whether the injured person was a seaman; whether the person survived or died from his injury; and whether the adjacent state's wrongful death statute provided a remedy. If an injury on the high seas resulted in the death of any person, DOHSA, 46 U.S.C. §§761-762 (1982), provided that certain named survivors could bring an

action in admiralty, with its accompanying bases of liability, to recover pecuniary losses. If an injury occurred in the territorial waters , recovery depended on who was injured. If a seaman were injured, recovery depended in turn on whether the seaman survived. If the seaman survived, he could sue his employer in a court of law for negligence under the Jones Act, 46 U.S.C. §688 (1982), or in admiralty court for unseaworthiness, see McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 222, 78 S.Ct. 1201, 1203, 2 L.Ed.2d 1272 (1958). If the seaman died from his injuries, the survivor's sole claim was for negligence under the Jones Act. Gillespie, 379 U.S. at 154-55, 85 S.Ct. at 312, 13 L.Ed.2d at 204. If a nonseaman were injured in a state's territorial water, he could recover for negligence. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). If

he died from his injuries, the nonseaman's survivors could recover for negligence or unseaworthiness provided that the state wrongful death statute allowed recovery on such theories of liability. The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959).

In Moragne, 398 U.S. at 395-96, 90 S.Ct. at 1785, 26 L.Ed.2d at 353-54, the Supreme Court noted the incongruities inherent in this tripartite scheme. First, within territorial waters, unseaworthiness, a violation of federal law, produced liability if the victim were merely injured but frequently not if he were killed. Second, identical breaches of the duty to provide a seaworthy vessel that result in death produced liability on the high seas but not in territorial waters adjacent to those states that did not recognize unseaworthiness claims. And finally, survivors of seamen had no

recourse for deaths in territorial water caused by unseaworthiness while survivors of nonseamen had such a remedy when provided by state law.

In an effort to remedy this unfair and irrational system, the Court in Moragne, id. at 409, 90 S.Ct. at 1792, 26 L.Ed.2d at 361, held that an action lies under general

458

maritime law for death caused by unseaworthiness. The Court recognized that in creating a new cause of action not before recognized by general maritime law and not the prduct of a comprehensive statutory scheme numerous subsidiary issues could be resolved only after further litigation in the lower courts. Id. at 405-08, 90 S.Ct. at 1790-92, 26 L.Ed.2d at 359-61.

In Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the court was called upon to give

further substance to the new cause of action created in Moragne. The Court held that in Moragne actions survivors were entitled to recover for loss of society, which "embrace[d] a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." Id. at 585, 94 S.Ct. at 815, 39 L.Ed.2d at 21.

The last pronouncement in this area by the Supreme Court came in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). In Higginbotham, 436 U.S. at 625, 98 S.Ct. at 2015, 56 L.Ed.2d at 587, the Court held that the exclusive remedy of survivors of persons killed on the high seas is under DOHSA with damages limited to pecuniary losses and, therefore, the survivors could not bring a Moragne cause of action for loss of society.

III.

The question before this court now is whether the loss of society damages awarded in Gaudet may be recovered by parents where they are not dependent on the seamen, and where the seamen were killed in territorial waters and are survived by spouse and/or children.[2] To answer this question, we must

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[2] Whether these parents may recover has not been addressed by this court, although this court and numerous district courts within the Fifth Circuit have addressed similar issues. See Skidmore v. Grueninger, 506 F.2d 716, 729 n. 11 (5th Cir. 1975) (this court allowed adult, nondependent daughter to recover for loss of her mother's society, noting that she was within class of beneficiaries under the Jones Act, DOHSA, and most state wrongful death acts); Complaint of Metcalf, 530 F.Supp. 446, 459-61 (S.D. Tex. 1981) (nondependent mother could recover for loss of society for death of her adult unmarried son); Palmer v. Ribax, Inc., 407 F.Supp. 974, 979 (M.D. Fla. 1976) (nondependent parents could recover for loss of society with their nineteen year old, unmarried son).

The most analogous case is Hamilton v. Canal Barge Co., 395 F.Supp. 978, 983-85 (E.D. La. 1975), where then District Court

be guided by the manner in which the Supreme Court created the cause of action and determined what damages were recoverable. Foremost in the Court's holding were the twin aims of maritime law: achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 386-88, 401, 403, 90 S.Ct. 1772, 1780-81, 1788-89, 26 L.Ed.2d 339 (1970);

---

2 (cont'd.) Judge Rubin held that parents not dependent on their son could recover for loss of his society even though he was survived by a child. Hamilton, 395 F.Supp. at 984, was properly based in large part on uniformity and special solicitude, the twin aims of admiralty. However, three years after Hamilton the Supreme Court decided in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978), that DOHSA provided the sole wrongful death cause of action for deaths occurring on the high seas to the exclusion of actions under Moragne. As discussed infra, any uniformity, and to a large extent special solicitude, created by the holding in Hamilton was upset.

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 577, 94 S.Ct. 806, 811, 39 L.Ed.2d 9 (1974).

Another principle that guided the Court was that, although it was creating a new cause of action, the Court would look to maritime law and general law, including state wrongful death actions,[3] where there

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3 State wrongful death actions are considered only for guidance in shaping the general maritime cause of action for wrongful death under Moragne. This court held in Matter of S/S HELENA, 529 F.2d 744, 753 (5th Cir. 1976), that the general maritime action for wrongful death preempted state wrongful death statutes. Furthermore, in Moragne, 398 U.S. at 396-403, 90 S.Ct. at 1785-1789, 26 L.Ed.2d at 354-358, the Court held that DOHSA, 46 U.S.C. §767 (1982) ("provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter"), did not prevent the federal courts, exercising maritime jurisdiction, from creating a new cause of action for deaths occurring in territorial waters independent from state wrongful death statutes. Accordingly, this court is not required to follow the Louisiana wrongful death statute in giving substance to the cause of action created in Moragne.

was no analogous maritime law. See Moragne, 398 U.S. at 388-93, 405-09, 90 S.Ct. at 1781-83, 1790-92, 26 L.Ed.2d at 349-52, 359-61; Gaudet, 414 U.S. at 577, 584-88, 94 S.Ct. at 811, 814-16, 39 L.Ed.2d at 16, 20-23.

Guided by the above principles, we hold that the parents in this case may not recover. First, denial of recovery lends more uniformity to admiralty jurisdiction than allowing recovery. The parents in this case could not have recovered for loss of society under other maritime remedies. DOHSA, 46 U.S.C. §762 (1982), limits recovery to pecuniary losses, and the Jones Act, 46 U.S.C. §688 (1982) (incorporating 45 U.S.C. §51 (1982), bars parents from recovering if the seaman is survived by spouse or child. See also Ivy v. Security Barge Lines Inc., 606 F.2d 524, 529 (5th Cir. 1979) (en banc) (survivors cannot recover for loss of society

under Jones Act), cert. denied, 446 U.S. 956, 100 S.Ct. 2927, 64 L.Ed.2d 815 (1980). Cf. Smith v. Ithaca Corp., 612 F.2d 215, 226 (5th Cir. 1980) (in territorial waters, cause of action for pecuniary damages under Jones Act for negligence does not exclude action for loss of society under Moragne for unseaworthiness). Therefore, maritime jurisdiction remains more uniform if the parents are not permitted to recover. If this court were to hold that the parents could recover for loss of society in this case, we would create vagaries in admiralty jurisdiction that Moragne was designed to destroy: first, where the death occurs in territorial waters, parents like those in this case could recover for loss of society on the basis of unseaworthiness under Moragne but not for negligence under the Jones Act, see Smith, 612 F.2d at 226; Ivy, 606 F.2d at 529; and second, and even more anomalous, parents similarly

situated to those in this case would have a cause of action for loss of society if the death occurred in territorial waters but not if the death occurred on the high seas, see DOHSA, 46 U.S.C. § 762 (1982) (no recovery for nonpecuniary damages); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (DOHSA exclusive remedy for deaths occurring on the high seas).

In Higginbotham 436 U.S. at 624 & n. 20, 98 S.Ct. at 2014 & n. 20, 56 L.Ed.2d 581 (1978), the Court hypothesized that its holding, that damages for loss of society could not be recovered for deaths occurring on the high seas even though such damages are recoverable when the death occurs in territorial waters, would not prove to be a significant threat to uniformity. The Court, however, was assuming that the damages for loss of society would be part of a recovery for pecuniary damages and would be symbolic

and not a substantial portion of the survivor's recovery. Id. at 624 n. 20, 98 S.Ct. at 2014 n. 20, 56 L.Ed.2d at 587 n. 20. This case, however, presents the complete inverse of the scenario depicted by the Court's assumptions in Higginbotham. Here, the parents' sole cause of action is for loss of society and the damages awarded by the district court for loss of society cannot be characterized as symbolic. Therefore, we believe allowing the parents to recover for loss of society under these facts poses a significant threat to uniformity.

The parents argue that uniformity can best be accomplished by allowing the beneficiaries listed in DOHSA, 46 U.S.C. §761 (1982), to sue for loss of society. The parents correctly point out that DOHSA is the sole congressional enactment dealing specifically and exclusively with wrongful death actions. See Moragne, 398 U.S. at 407, 90

S.Ct. at 1791, 26 L.Ed.2d at 360. If the court refers to the DOHSA beneficiaries to determine who may recover under Moragne, the parents argue, then the beneficiaries in maritime wrongful death actions would be uniform. According to the parents, that they cannot recover nonpecuniary losses under DOHSA is a separate issue that should not be considered in determining who may sue. We believe that

460

the issue cannot be so split. To do so would impose superficial uniformity over substantive vagaries.

The second aim of maritime law, providing special solicitude to seamen, would not be furthered in any meaningful way by allowing the parents in this case to recover for loss of society. In Gaudet, 414 U.S. at 577, 94 S.Ct. at 811, 39 L.Ed.2d at 16, the Court stated that Moragne was designed to extend to the dependents of maritime wrongful

death victims admiralty's special solicitude to seamen.[4] To the extent that the purpose of admiralty 's special solicitude to the survivors of seamen is to provide for their

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[4] That the Court used the word "dependents" in discussing the right to recover for loss of society, while lending support to our holding, is not dispositive. Chief Justice Marshall said:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400, 5 L.Ed. 257, 398 (1821).

financial support, the special solicitude aim of admiralty has no relevance in this case. The parents in this case were not dependent on their sons.

If a purpose of the solicitude is to provide the survivors peace of mind both before a seaman undertakes to venture upon hazardous and unpredictable sea voyages and after the death of the seaman, admiralty's special solicitude does not automatically mean that the parents in this case should recover. As stated above, the parents could not recover if the seamen's deaths occurred on the high seas or were the result of negligence but not of unseaworthiness. Admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness. Similarly, the parents have not explained why this court

should extend to them special solicitude when, but for the happenstance that the seamen were killed in territorial waters and by unseaworthiness, Congress would have denied them recovery under DOHSA and the Jones Act.

In deciding this question, this court should also consider analogous maritime law, congressional enactments, and state wrongful death statutes. As Justice Harlan noted in Moragne, 398 U.S. at 406, 90 S.Ct. at 1791, 26 L.Ed.2d at 360, general maritime law, which until Moragne did not provide a cause of action for wrongful death, does not answer who are the proper beneficiaries entitled to recover under Moragne. Looking to congressional enactments, as we have noted, the parents have no claim under either DOHSA or the Jones Act. Similarly, the vast majority of states do not provide parents similarly situated to those in this case the right to

recover for loss of society.[5]

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5 See Ala. Code §§6-5-410, 43-8-41, 43-8-42 (1982) (parents cannot recover if decedent survived by spouse and issue or by issue alone); Alaska Stat. §09.55.580 (1984) (parents cannot recover if decedent survived by spouse or issue); Ariz. Rev. Stat. Ann. §12-612 (1982) (parents cannot recover if decedent survived by spouse or issue); Cal. Civ. Proc. Code §376 (West Supp. 1985) (parents cannot recover if decedent survived by spouse and issue or by issue); Colo. Rev. Stat. §§13-21-201, 13-21-203 (1974) (nonpecuniary damages not recoverable and parents cannot recover if decedent survived by spouse or issue); Conn. Gen. Stat. Ann. §52-55 (West Supp. 1985) (no recovery for loss of society; damages measured by loss to decedent); Ga. Code Ann. §§74-108(c)(2), 105-1307 (1982 & Supp. 1984) (parents cannot recover if decedent survived by spouse or issue); Hawaii Rev. Stat. § 663 (1976) (nondependent parents cannot recover); Idaho Code §§5-311, 15-2-102-103 (1979 & Supp. 1985) (parents cannot recover if decedent survived by spouse and issue or by issue); Ill. Ann. Stat. ch. 70, §2 (Smith-Hurd Supp. 1985) (only pecuniary damages recoverable); Ind. Code Ann. §34-1-1-2 (West Supp. 1985) (parents cannot recover if decedent survived by spouse or issue); Kan. Stat. Ann. §§60-1901-60-1905, 59-504 (1983) (parents cannot recover if decedent survived by spouse or issue); Ky. Rev. Stat. §411.130 (Supp. 1984) (parents

In conclusion, we hold that in a general maritime wrongful death cause of action

461

under Moragne, nondependent parents may not recover for loss of society where their deceased children were killed in territorial waters and are survived by spouse and/or child. The judgment of the district court is REVERSED.

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5 (cont'd.) cannot recover if decedent survived by spouse or issue); La. Civ. Code Ann. art. 2315 (West Supp. 1985) (parents cannot recover if decedent survived spouse or issue); Me. Rev. Stat. Ann. tit. 18-A, §2-804 (West 1964) (parents cannot recover if decedent survived by spouse or issue); Mass. Gen. Laws Ann. ch. 229, §§1-2 (West 1985) (parents cannot recover if decedent survived by spouse or issue); Mich. Comp. Laws Ann. §§600.2922, 700.105 (West 1980 & Supp. 1985) (parents cannot recover if decedent survived by spouse and issue or by issue); Minn. Stat. Ann. §573.02 (West Supp. 1985) (only pecuniary damages recoverable); Miss. Code Ann. §11-7-13 (Supp. 1985) (parents cannot recover if decedent survived by spouse or issue);

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5 (cont'd.) N.H. Rev. Stat. Ann. §556:12 (1974) (no recovery for loss of society); N.J. Rev. Stat. Ann. §2-A: 31-5 (West Supp. 1985) (only pecuniary damages recoverable); N.M. Stat. Ann. §41-2-3 (1985) (parents cannot recover if decedent survived by spouse or issue); N.Y.Est. Powers & Trusts §5-4.3 (McKinney Supp. 1985) (only pecuniary damages recoverable); N.C. Gen. Stat. §§28A-18-2, 29-14, 29-15 (1984) (parents cannot recover if decedent survived by spouse and issue or by issue); N.D. Cent. Code §§32-21-04, 30.1-04-02, 30.1-04-03 (1976) (parents cannot recover if decedent survived by spouse and issue or by issue); 20 Pa. Cons. Stat. Ann. §§2102, 2103 (Purdon 1982 & Supp. 1985), 42 Pa. Cons. Stat. Ann. & 8301 (Purdon 1982 & Supp. 1985) (parents cannot recover if deceased survived by spouse and issue or by issue); R.I. Gen. Laws §10-7-2 (Supp. 1984) (parents can recover for loss of society only if deceased child is unemancipated minor); S.C. Code Ann. §15-51-20 (Law. Co-op. 1977) (parents cannot recover if decedent survived by spouse or issue); S.D. Codified Laws Ann. §21-5-7 (1978) (only pecuniary damages recoverable); Tenn. Code Ann. §20-5-106 (1980) (only pecuniary damages recoverable); Vt. Stat. Ann. tit. 14, §1492 (Supp. 1985) (parents can recover for loss of society for only minor children); Va. Code §8.01-53 (1984) (parents cannot recover if decedent survived by spouse or issue); Wash. Rev. Code Ann. §4.20.020 (Supp. 1985) (parents cannot recover if decedent survived by spouse or issue); W.Va. Code §51-7-6 (Supp. 1985) (parents cannot recover if decedent survived by spouse or issue).

(3)

NO. 85-1144

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

KAREN SISTRUNK, SONYA SISTRUNK
and BETTY MAE RUTLAND,

Petitioners

versus

CIRCLE BAR DRILLING COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 pp

TABLE OF CONTENTS

Page

Table of Contents.....i
Table of Authorities.....ii
Summary of Argument.....iii
Argument.....1
Conclusion.....4
Certificate of Service.....5

TABLE OF AUTHORITIES

Cases **Page**

The Harrisburg, 119 U.S. 199 (1886).....1

Ivy v. Security Barge Lines, Inc., 606 F.2d 524 (5th Cir. 1979), *cert. denied*, 446 U.S. 956, *reh. denied*, 448 U.S. 912(1980).....3

Mobil Oil Corporation v. Higginbotham, 436 U.S. 618, *reh. denied*, 439 U.S. 884 (1978).....2, 3

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).....1, 2, 3

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, *reh. denied*, 415 U.S. 986 (1974).....1, 2

Sistrunk v. Circle Bar Drilling Company, 770 F.2d 455, *reh. denied*, 775 F.2d 301 (5th Cir. 1985).....1, 3, 4

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980).....3

Statutes

The Death on the High Seas Act, 46 U.S.C. § 761, *et seq*.....2, 3

The Jones Act, 46 U.S.C. § 688.....2

SUMMARY OF ARGUMENT

The Fifth Circuit's decision is consistent with this Court's decisions in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, *reh. denied*, 415 U.S. 986 (1974), and *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, *reh. denied*, 439 U.S. 884 (1978).

ARGUMENT

Respondent, Circle Bar Drilling Company, respectfully requests this Court to deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion, reported at 770 F.2d 455 and reproduced in the Appendix filed by petitioners. As stated therein:

> The question before this court now is whether the loss of society damages awarded in *Gaudet* may be recovered by parents where they are not dependent on the seamen, and where the seamen were killed in territorial waters and are survived by spouse and/or children.[1]

Applying the twin principles of uniformity and solicitude to seamen, established by this Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, *reh. denied*, 415 U.S. 986 (1974), the Fifth Circuit answered that question in the negative, holding that the parents, petitioners herein, are not entitled to recovery.

Contrary to the assertions made by petitioners, the Fifth Circuit's opinion is not in conflict with any decision of this Court, but, instead, preserves uniformity in the law of maritime wrongful death by refusing to "create vagaries in admiralty jurisdiction that *Moragne* was designed to destroy."[2] In *Moragne*, this Court, to achieve uniformity and to eliminate anomalies existing in the area of maritime wrongful death, overruled eighty-four years of precedent, dating back to *The Harrisburg*, 119 U.S. 199 (1886), and

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[1] 770 F.2d at 458

[2] 770 F.2d at 459

held that an action lies under general maritime law for death caused by unseaworthiness. The Court's main concern in *Moragne* was to establish a remedy for the surviving spouses, orphans and dependents of dead seamen. That concern was reiterated in *Gaudet*, wherein the Court stated that *Moragne* was

> . . . designed to extend to the *dependents* of maritime wrongful death victims admiralty's "special solicitude for the welfare of those men. . ." Our approach to the resolution of the issue before us must necessarily be consistent with the extension of this "special solicitude" to the *dependents* of the seafaring decedent. (Emphasis added).
>
> 414 U.S. at 577.

In *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978), this Court reaffirmed the principle of uniformity, to be sacrificed only in those instances where a statute dictates otherwise. This is not one of these instances. The only statute applicable to the wrongful death of seamen in territorial waters is the Jones Act, which provides no remedy for petitioners. Thus, the Fifth Circuit's decision, denying recovery to petitioners, is consistent with *Moragne*, *Gaudet*, and *Higginbotham* and preserves the uniformity of maritime law by providing complete identity among the beneficiaries of seamen whether death resulted from negligence or unseaworthiness.

The adoption of the DOHSA schedule, advocated by petitioners, was expressly rejected by the Fifth Circuit, because it would create the following anomalies:

> . . .first, where the death occurs in terrritorial waters, parents like those in this case could

> recover for loss of society on the basis of unseaworthiness under *Moragne* but not for negligence under the Jones Act, *see Smith*, 612 F.2d at 226; *Ivy*, 606 F.2d at 529; and second, and even more anomalous, parents similarly situated to those in this case would have a cause of action for loss of society if the death occurred in territorial waters but not if the death occurred on the high seas, *see* DOHSA, 46 U.S.C. § 762 (1982) (no recovery for nonpecuniary damages); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (DOHSA exclusive remedy for deaths occurring on the high seas).[3]

Petitioners' argument that denial of recovery to the parents would run counter to admiralty's aim of special solicitude to the survivors of seamen, was likewise found to be without merit by the Fifth Circuit for two reasons:

One, if solicitude means providing financial support, it has no relevance in this case, because petitioners did not receive any support and were not dependent on their deceased sons. Two, if solicitude means providing the survivors peace of mind both before a seaman embarks on a sea voyage and after his death, his parents still would not be entitled to recover because

> . . .admiralty cannot provide the parents solicitude at a voyage's outset when their right to recover for loss of society is dependent on the fortuity that the deaths occur in territorial waters and are caused by unseaworthiness. Similarly, the parents have not explained why this court should extend to them special solicitude when, but for the happenstance that the seamen were

[3] 770 F.2d at 459

killed in territorial waters and by unseaworthiness, Congress would have denied them recovery under DOHSA and the Jones Act.[4]

In sum, petitioners have failed to prove any inconsistency between the decision for which review is being sought and prior decisions of this Court and have further failed to pr[illegible]t the principles of uniformity and solicitude wo[illegible] served by a reversal of the Fifth Circuit's decision.

CONCLUSION

The Fifth Circuit's decision, refusing to create new anomalies in the law of admiralty, is based upon and consistent with this Court's opinions in *Moragne*, *Gaudet* and *Higginbotham*. The Petition for a Writ of Certiorari fails to state any grounds for this Court's exercise of supervisory jurisdiction and should be denied.

Respectfully submitted,

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[4] 770 F.2d at 460

CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to be served on Gerald E. Meunier, Esquire, 1718 First NBC Building, New Orleans, Louisiana 70112, by placing same in the United States Mail, postage prepaid, this _____ day of _____, 1986.

_____

MARGOT MAZEAU